



IT IS ORDERED as set forth below:

Date: January 26, 2010

Mary Grace Diehl

**Mary Grace Diehl
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN RE:	:	Chapter 7
	:	
EDWARD OCASIO, JR. and	:	Case Number: 08-69736-MGD
ROSA I. CABA a/k/a/ ROSA OCASIO,	:	
	:	
Debtors,	:	Judge Mary Grace Diehl
	:	
ROBERT DANIEL,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Adversary Proceeding: 09-06112
	:	
EDWARD OCASIO, JR. and	:	
ROSA I. CABA,	:	
	:	
Defendants.	:	

**ORDER GRANTING PLAINTIFF'S MOTION TO SET ASIDE THE NOVEMBER 10,
2009 DISMISSAL ORDER AND GRANTING DEFENDANTS' MOTION TO DISMISS**

Before the Court are Plaintiff's Motion to Set Aside Dismissal and Defendants' response thereto. (Docket Nos. 9 & 10). The matter came on for hearing January 14, 2010. Present at the

hearing were Craig Lefkoff, counsel for Plaintiff, and Howard Rothbloom and Adam Herring, as counsel for Defendants.

Plaintiff commenced the above-styled adversary proceeding on February 27, 2009, by filing a complaint to determine dischargeability of debt and to object to Debtors' discharge. Defendants filed and served an answer on March 30, 2009. The case docket reflects that Plaintiff took no further action in prosecuting his claims. Defendant filed a Motion to Dismiss on November 7, 2009. There was no response by Plaintiff. The Court subsequently entered an Order dismissing the adversary proceeding, on November 10, 2009, pursuant to Rule 7041-1(a)(3) of the Local Rules of Practice for the United States Bankruptcy Court for the Northern District of Georgia.

Plaintiff filed a Motion to Set Aside Dismissal on November 18, 2009 on the basis of improper service. Defendants' certificate of service noted that Plaintiff's counsel was electronically served with a notice of electronic filing of the Motion to Dismiss by way of the court generated CM/ECF system. To effectuate electronic service, the party itself must electronically serve the other party. BLR 5005-8(b), N.D. Ga. "The reference to electronically mailed notice that appears on most CM/ECF Notices of Electronic Filing is not service or a substitute for service of the document for which the Notice refers." CM/ECF ADMIN. PROC., IV(B). Defendants' failure to properly effectuate service requires the Court to grant Plaintiff's Motion to Set Aside Dismissal and vacate the November 10, 2009 Order of Dismissal.

At the hearing, the parties requested to move forward on the merits of Defendants' Motion to Dismiss. The Court heard oral argument from Mr. Lefkoff and Mr. Herring. The applicable rules give the Court discretion to dismiss an adversary proceeding for failure to prosecute. FED. R. CIV. P. 41(b); FED R. BANKR. P. 4041; BLR 7041(1)(a)(1) and (3). Rule 41(b) of the Federal Rules of

Civil Procedure is made applicable to this Court by Rule 7041 of the Federal Rules of Bankruptcy Procedure. Rule 41(b) governs involuntary dismissals based on plaintiff's failure to prosecute the proceeding and plaintiff's failure to follow court rules or orders. Local Rule 7041-1(a)(3) provides authority to dismiss an adversary proceeding that "has been pending in the Bankruptcy Court for more than six months without any substantial proceedings of record having been taken, as shown by the record docket or other manner." BLR 7041-1(a)(3), N.D. Ga.

In the Eleventh Circuit, dismissal with prejudice requires "the district court [to] find[] a clear record of delay or willful conduct and that lesser sanctions are inadequate to correct such conduct." *Zocaras v. Castro*, 465 F.3d 479, 483 (11th Cir. 2006). In addition to its explicit power under Rule 41(b), "a court also has the inherent ability to dismiss a claim in light of its authority to enforce its orders and provide for the efficient disposition of litigation." *Id.* (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31, 82 S. Ct. 1386, 1389, 8 L. Ed. 2d 734 (1962)). Dismissal of a case with prejudice is considered an extreme sanction and applicable only in limited circumstances. *Goforth v. Owens*, 766 F.2d 1533, 1535 (11th Cir. 1985).

There is a clear record of inactivity and delay in this case that was acknowledged and uncontested by Plaintiff. Defendants' counsel's unsuccessful attempts to communicate with Plaintiff's counsel are documented and uncontroverted. Defendants' counsel outlined multiple attempts to make contact with Plaintiff's counsel by telephone, email and written correspondence. Plaintiff's counsel concedes he was unresponsive to opposing counsel, that no formal discovery has been conducted, and that no consolidated pre-trial order was filed as prescribed by BLR 7016-2 despite receiving Defendants proposed portion of such order. Plaintiff asserted that his client in an individual capacity had been investigating the underlying claims during the pendency of the

adversary proceeding and that the Court is not mandated to dismiss the case for want of prosecution. Plaintiff's counsel offered his increased case load as an explanation for the failure to prosecute this action properly.

In bringing an action, the plaintiff is charged with a duty of diligence to prosecute the action, and the plaintiff bears the responsibilities for advancing the action, including submission of a proposed pre-trial order. *See, e.g.*, BLR 7016-2, N.D. Ga. The delay in this case is particularly troubling given the claims at issue in the proceeding. Plaintiff's complaint included a claim objecting to Defendants' discharge. Defendants' Chapter 7 bankruptcy case was filed on May 27, 2008. The Chapter 7 Trustee issued a no distribution report on July 1, 2008. Defendants' have fully complied with all procedures and requirements in their underlying Chapter 7 bankruptcy case and this adversary proceeding, including examination by counsel for Plaintiff prior to the commencement of the adversary proceeding on August 8, 2008. Through no fault of their own, Defendants' underlying bankruptcy case has been mired in delay, resulting is a lengthy period of uncertainty regarding their discharge. This Court, in accordance with the Bankruptcy Rules and Bankruptcy Code, is charged with protecting the rights of honest but unfortunate debtors, including ensuring a prompt discharge for qualifying debtors. Plaintiff's delay in this adversary proceeding and Defendants' protracted underlying Chapter 7 bankruptcy case are greatly distressing to the Court.

The Court also finds that lesser sanctions are inadequate to correct the delay or prompt diligence. Similarly, lesser sanctions would fail to lessen the prejudice imposed on Defendants. Debtors have a strong interest in the prompt resolution of all discharge issues. *See In re Schultz*, 134 B.R. 604, 605 (Bankr. E.D. Mich. 1991). The policy of providing a prompt resolution with finality is evidenced by the Federal Rules of Bankruptcy Procedure. *See* 11 U.S.C. § 727 (prescribing that

“[t]he court shall grant the debtor a discharge unless” and providing time limitations on objections to discharge and revocation of discharge); *In re Woods*, 260 B.R. 41, 43 (Bankr. N.D. Fla. 2001); *see also In re Davis*, 195 B.R. 422, 424 (Bankr. W.D. Mo. 1996). The deadlines provided for in the Rules “are to be interpreted strictly, and in a manner consistent with the Code's policies . . . favoring the fresh start for the debtor, and [the] prompt administration of the case.” *Taylor v. Freeland & Kronz*, 503 U.S. 638, 118 L. Ed. 2d 280, 112 S. Ct. 1644 (1992).

Plaintiff’s counsel did not offer a corrective proposal to rectify the delay and prejudice to Defendants. Instead, he stated that it was his intention to seek authority from the Court to withdraw as counsel if the action continued. The Court’s interest in an appropriate redress for the prejudice to the Defendants’ is only exacerbated by Plaintiff’s counsel’s agenda. The importance of promptly resolving discharge litigation cannot be understated, and lesser sanctions in this case are not adequate.

Under all the facts and circumstances of this case, dismissal is the proper remedy. The Court’s inherent power to avoid congestion and delay, while promptly disposing of cases, supports dismissal. *Link v. Wabash R.R. Co.*, 370 U.S. at 629-630. Additionally, an involuntary dismissal of this action is justified under Federal Rule of Civil Procedure 41(b), Federal Rule of Bankruptcy Procedure 7041, and Local rule 7041-1(a)(3). The undisputed record and timeline show a clear record of inaction and delay, and the prejudice to Defendants cannot be rectified by lesser sanctions. The delay and uncertainty for Defendants with respect to the status of their discharge will only be worsened by providing Plaintiff with a second chance to begin to properly prosecute his claims. For the reasons set forth above, sufficient grounds exist to dismiss this action. Accordingly, it is hereby

ORDERED that the Plaintiff’s Motion to Set Aside Dismissal is **GRANTED** and the

Court's November 10, 2009 Order of Dismissal is **VACATED**.

It is **FURTHER ORDERED** that Defendants' Motion to Dismiss is **GRANTED**.

It is **FURTHER ORDERED** that the above-styled adversary proceeding is **DISMISSED** with prejudice.

It is **FURTHER ORDERED** that Orders discharging Debtors be entered by the Clerk.

The Clerk is directed to serve a copy of this Order on Plaintiff, counsel for Plaintiff, Defendants, and counsel for Defendants, the U.S. Trustee, the Chapter 7 Trustee, and all creditors in the Defendants' bankruptcy case.

END OF DOCUMENT